IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No.: DA 09-0510

STATE OF MONTANA, *ex rel.*
DEPARTMENT OF ENVIRONMENTAL QUALITY,

PLAINTIFF/APPELLANT,

v.

BNSF RAILWAY COMPANY,

DEFENDANT/APPELLEE/CROSS-APPELLANT.

APPELLANT'S BRIEF

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On Appeal from the First Judicial District Court, Lewis and Clark County
The Honorable Jeffrey M. Sherlock, Presiding
District Court Cause No. BDV 2004-596

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I. STATEMENT OF ISSUES

1. Whether the District Court erred in its conclusion of law that Appellee/Cross Appellant's abatement of the contamination from the subject facilities ordered by the District Court under Montana's Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Mont. Code Ann. §§ 75-10-701, *et seq.*, authority (Mont. Code Ann. § 75-10-711(8)) does not require compliance with Appellant's Record of Decision ("ROD"), KRY Site, Kalispell, Montana, issued June 2008, issued under Appellant's CECRA authority (Mont. Code Ann. § 75-10-721) until that ROD has been approved by a Court.

2. Whether the District Court erred in its conclusion of law that apportionment is available as a defense to actions under CECRA, Mont. Code Ann. §§ 75-10-701, *et seq*.

3. Whether the District Court erred in its conclusions of law that resulted in the dismissal of Appellant's claim of public nuisance.

4. Whether the District Court erred in its evidentiary decision at trial to allow Mr. Pat Keim to provide expert witness testimony. Trial Transcript ("TR."), p. 1232 l. 15 through p. 1236 l. 14.[1]

II. STATEMENT OF THE CASE

This case presents important issues of first impression as to the scope and meaning of Montana's "Superfund" law, the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code. Ann. §§ 75-10-701, *et seq.* ("CECRA"). While there are literally thousands of published and unpublished court opinions interpreting the Federal "Superfund" statute, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA"), this Court has only briefly discussed CECRA twice since its inception twenty-five years ago. *Sunburst School Dist. No. 2 v. Texaco, Inc*., 2007 MT 183, ¶¶ 50 – 59, 338 Mont. 259, 165 P.3d 1079 (CECRA does not preempt common law claims for restoration damages); and *Montana Petroleum Tank Release Compensation Bd. v. Crumleys, Inc.,* 2008 MT 2, ¶ 13, 341 Mont. 33, 174 P.3d 948 (owner

[1] In its Notice of Appeal, DEQ listed as an additional issue for appeal a specific finding of fact by the District Court as to BNSF's willingness to conduct the abatement, which it now drops as an appeal issue.

of petroleum storage tank was liable under CECRA for releases from its tanks). Neither of those cases addressed the fundamental CECRA issues involved in this case—the scope of Appellant State of Montana, *ex rel.* Department of Environmental Quality ("DEQ's") authority under CECRA to determine appropriate environmental cleanup requirements and the meaning and reach of CECRA's joint and several liability provisions.

This dispute involves three adjoining/overlapping facilities listed as "state superfund sites"[2] under Mont. Code Ann. § 75-10-704: Kalispell Pole and Timber ("KPT"), a former wood treatment plant; the Reliance Refining Company ("Reliance"), a former crude oil refinery; and the Yale Oil Corporation ("Yale"), a former crude oil refinery and bulk refined petroleum storage site (jointly the "KRY Site"), located just north of Kalispell on the Stillwater River. In the trial court, DEQ sought and received two separate CECRA abatement orders under Mont. Code Ann. § 75-10-711(8) requiring Appellee/Cross-Appellant BNSF Railway Company ("BNSF") to abate the

[2] Known more formally as the CECRA Priority List.

imminent and substantial endangerment from the releases of hazardous or deleterious substances from the KPT and Reliance facilities.[3]

The first abatement order requiring BNSF to abate the contamination emanating from the KPT facility was issued by the District Court as a result of granting DEQ's summary judgment motion as to BNSF's liability under CECRA for the contamination associated with the KPT facility. Dkt. # 416.[4] The second abatement order was issued following a bench trial and the Court's determination that BNSF was liable under CECRA for the contamination associated with the Reliance facility. Dkt. # 588. The District Court combined these two abatement orders into a Final Unified Abatement Order ("Final Order") which required BNSF "to abate the imminent and substantial endangerment to the public health, welfare and

[3] Originally there were six other defendants, but each of them settled with DEQ in Consent Decrees approved by the District Court under Mont. Code Ann. § 75-10-719. District Court Case Register Docket # 193 and # 544. One of the settling parties, Exxon Mobil, paid sufficient remedial action costs to DEQ to resolve the issues involving the contamination emanating from the Yale facility and, therefore, after the Consent Decree approving that settlement was issued by the Court, the Yale facility was no longer at issue in this case.

[4] References in this Brief to "Dkt. #" refer this Court to the District Court's Case Register Docket with corresponding numbered documents, submitted as an Appendix herewith.

safety and the environment from the releases at the [KPT] facility and at the [Reliance] facility . . ." Dkt. # 614, ¶ 1.

The District Court's decisions as to **whether** BNSF must abate the contamination were consistent and correct. But the District Court erred in determining **how** that abatement must take place. In particular, DEQ is the agency charged with administration of CECRA and is given broad powers under Mont. Code Ann. § 75-10-721 to determine the degree of cleanup required for a facility and how that cleanup must proceed. DEQ's regulatory decision regarding cleanup for the KRY Site is set forth in its ROD. The District Court erred as a mater of law when, in its Final Order, it required final judicial approval of DEQ's ROD before BNSF's abatement must comply with the terms of the ROD. Dkt. # 614, ¶ 3.

The District Court also erred as a matter of law when it: (1) allowed BNSF to raise the defense of apportionment to CECRA's joint and several liability; (2) dismissed DEQ's public nuisance claim; and (3) admitted the testimony of Pat Keim.

III. STATEMENT OF RELEVANT FACTS

As mentioned above, this case involves environmental cleanup at three adjacent facilities which border the Stillwater River in Flathead County: the KPT facility, the Reliance facility, and the Yale facility.[5] Dkt. # 416, p. 2. In August 2004, DEQ filed the subject action to require the defendants to abate the imminent and substantial endangerment to the public health, safety, and welfare and to the environment posed by the three facilities, to recover past and future remedial action costs, and to obtain a declaratory ruling.

The Kalispell Pole and Timber Company (KPTCo) leased property from BNSF and its predecessors for 45 years for a wood pole treating business and treated poles in a solution containing pentachlorophenol ("PCP") and oil. Dkt. # 416, p. 3. Spills, drips, and leaks of this solution occurred as part of the operations. Dkt. 588, p. 26. In addition to leasing its property to be used for these operations, BNSF participated in the KPTCo operations in other ways. BNSF transported approximately 2,298,000

[5] See note 3, *infra*. Liability for the Yale facility was resolved through a Consent Decree with Exxon Mobil and the only remaining contamination found in the groundwater is attributable to the other two facilities. (Dkt. # 416, p. 19). Therefore, no further factual discussion of Yale is presented here.

pounds of PCP to KPTCo, sold poles to KPTCo, and shipped treated poles out by rail. Dkt. # 588, p. 27; Dkt. # 416, p. 3. BNSF knew of KPTCo's polluting activities, but did not protest or seek to end KPTCo's use of the property, and profited from KPTCo's business activities. Dkt. # 416, p. 4. In a Montana federal district court case, *Burlington N. & Santa Fe Ry. Co. v. Kalispell Pole & Timber Co.*, CV 97-177-M-DWM, BNSF sued KPTCo and both companies admitted liability for the cleanup of the KPT facility. Dkt. #416, p. 4. KPTCo transferred all of its assets to BNSF in an Assignment Agreement and KPTCo is now defunct. Dkt. # 416, p. 4. After that assignment of KPTCo's assets, BNSF argued that there was no imminent and substantial endangerment to public health, welfare or safety, or the environment posed by the KPT facility. Dkt. # 416, p. 14. The District Court soundly rejected BNSF's position and determined (Dkt. # 416) that BNSF was jointly and severally liable for the contamination at the KPT facility. Dkt. # 588, *Finding of Fact,* ¶ 28.

The Reliance facility is located east of the KPT facility and was used by various companies as a refinery and cracking plant from the 1920s through about 1963. Dkt. # 588, *Finding of Fact*, ¶ 5. Waste petroleum exists throughout the Reliance facility. Dkt. # 588, *Finding of Fact,* ¶ 31. In

addition to owning property at the Reliance facility (Dkt. # 588, *Conclusion of Law,* ¶ 14), it is undisputed that BNSF[6] brought in hundreds of gallons of crude oil that were unloaded at the loading docks and, once refined, transported out of the area by BNSF. Dkt. # 588, *Finding of Fact,* ¶ 34. There is thick petroleum product waste and sludge located within and adjacent to the property owned by BNSF. Dkt. # 588, *Finding of Fact,* ¶ 36. Historical documents show that from 1931 to 1942 BNSF hauled in over 300,000 gallons of crude oil and transported out over 790,000 gallons of refined petroleum products. Dkt. # 588, *Finding of Fact,* ¶ 37.

Other historical documents established that BNSF railroad cars arrived at the Reliance facility "leaking badly" and that in one instance two refinery workers "got a soaking" when unloading crude oil from a BNSF railroad car. Dkt. # 588, *Finding of Fact,* ¶¶ 38–39. Significantly, when the refinery received shipments of crude oil and the holding tanks were full, the crude oil was emptied onto the ground in earth-diked pools on BNSF property in an area known as the "Y." Dkt. # 588, *Finding of Fact,* ¶¶ 40–42. The District Court found that BNSF assisted in the dumping of

[6] References to BNSF include its predecessors Burlington Northern Railway Company, Burlington Northern, Inc., and Great Northern Pacific Company. Dkt. # 588, *Finding of Fact,* ¶ 2.

petroleum products on the surface of the earth. Dkt. # 588, *Finding of Fact,* ¶¶ 52–53, *Conclusion of Law,* ¶ 10. In addition, the Reliance facility is impacted from contamination at the KPT facility. Dkt. # 588, *Finding of Fact,* ¶ 54. Specifically, there is PCP and petroleum found on the Reliance facility in the surface soils, subsurface soils, and in the groundwater; all of that penta and some of the petroleum came from the KPT facility. Dkt. # 588, *Finding of Fact,* ¶¶ 59–61, 73. After trial was heard by the District Court, the court determined that BNSF is jointly and severally liable for the releases or threatened releases of hazardous or deleterious substances at the Reliance facility based on BNSF's status as a current owner, Mont. Code Ann. § 75-10-715(1)(a); a past owner and operator, Mont. Code Ann. § 75-10-715(1)(b); and as an arranger, Mont. Code Ann. § 75-10-715(1)(c). Dkt. # 588, *Conclusion of Law,* ¶¶ 8–10.

IV. STANDARD OF REVIEW

The first three issues of this appeal are limited to legal conclusions reached by the trial court. This Court reviews a district court's conclusions of law to determine whether its interpretation and application of the law is correct. *Sunday v. Harboway*, 2006 MT 95, ¶ 17, 332 Mont. 104, 136 P.3d

965; *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619. No deference is due a trial court's legal conclusions. *Steer, Inc. v. Department of Revenue of State of Montana*, 245 Mont. 470, 474–475, 803 P.2d 601, 603 (1990).

The final issue for appeal challenges the District Court's interpretation of the Rules of Evidence, MRE 406 and 702. In exercising its discretion in admitting or excluding evidence, the court is bound by the Rules of Evidence or applicable statutes and, thus, to the extent a trial court's ruling is based on an interpretation of an evidentiary rule or statute, the Supreme Court's review is de novo. *State v. Passmore,* 2010 MT 34, 2010 WL 529374.

V. SUMMARY OF ARGUMENT

It was error for the District Court to condition the application of the ROD to BNSF's abatement on judicial approval of the ROD. In its Final Order, the District Court acknowledged that BNSF's abatement would have to comply with the ROD, but not until the ROD has received final judicial approval. Dkt. # 614, ¶ 3. However, the ROD is DEQ's decision as to how cleanup will be conducted and it is entitled to the same presumption of

validity as any other legislatively authorized administrative agency decision. Moreover, while BNSF has filed an appeal of the ROD, such a challenge to an agency decision has no effect on the validity of that decision unless and until the reviewing court finds the agency acted arbitrarily and capriciously in issuing the decision and remands it to the agency for further action. Mont. Code Ann. § 2-4-702(3). Therefore, unless or until a court deems the cleanup identified in the ROD legally unenforceable, the remediation plan set by the ROD is the only authorized cleanup applicable to the contaminated site.

It was also error for the District Court to allow BNSF the defense of apportionment. Federal courts have interpreted CERCLA as allowing apportionment as a defense only because CERCLA does not explicitly require joint and several liability. Such a defense is not available under CECRA because—unlike CERCLA—CECRA explicitly provides for joint and several liability and apportionment is not one the few specifically enumerated exclusions or defenses to that liability.

It was also error for the District Court to dismiss DEQ's public nuisance claim. The District Court found that the environmental contamination, which BNSF contributed to, is an imminent and substantial

endangerment to public health, safety, welfare and the environment. As such, that contamination is a public nuisance *per se*.

Finally, it was error for the District Court to admit the routine practice testimony of Mr. Pat Keim. The foundation for Mr. Keim's testimony established the routine for other railroad companies, not the routine of the railroad companies at issue in this case.

VI. ARGUMENT

Central to the first two issues on appeal is the proper interpretation of CECRA and DEQ's authority thereunder. CECRA was originally modeled after its federal parent statute, CERCLA, 42 U.S.C. §§ 9601, *et seq.*, although CECRA does not mirror CERCLA, and has had numerous amendments since its adoption. CECRA has, as its first purpose, to "protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances." Mont. Code Ann. § 75-10-706(1)(a). To that end, CECRA imposes strict, joint and several liability for the cleanup of hazardous or deleterious substances on those who fall within its statutorily defined classes of liable persons. Mont. Code Ann. § 75-10-715(1)(a)–(d). As with the interpretation of CERCLA,

CECRA must be interpreted "liberally" to fulfill two fundamental purposes: (1) to "protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites;" and (2) to "assur[e] that responsible persons pay for the cleanup." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (2001) (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir., 1997). An application of CECRA that either fails to protect and preserve public health and the environment, or fails to assure that responsible parties pay for the cleanup, violates the spirit and intent of CECRA.

DEQ is the agency charged with administration of CECRA and is given broad powers under Mont. Code Ann. § 75-10-721 to determine the degree of cleanup required for a site and how that cleanup must proceed. The ROD is the end result of a rigorous and lengthy study and review process that requires a site history evaluation, a remedial on-site investigation, evaluation of field data and laboratory work in a remedial investigation report, determination of appropriate cleanup levels, including risk analysis and fate and transport studies, a feasibility study to determine available cleanup methods, a proposed plan, solicitation and consideration of public comments (including comments from potentially liable persons

("PLPs")) on the proposed plan, and revisions to the final remedy determination based on those public comments.[7] TR., p. 97, l. 10 through p. 110, l. 9 (testimony of Denise Martin). The ROD accounts for the many complicated factors DEQ is required to consider (and some it may consider) in reaching its ROD. Mont. Code Ann. § 75-10-721.

A. **As the legislatively authorized agency decision as to how the cleanup of the KRY Site must be conducted, the Court's Final Order cannot, as a matter of law, require that the ROD be judicially approved before BNSF's abatement must comply with its terms.**

1. DEQ is the agency charged by the legislature to determine how abatements or cleanups of contamination must occur and its decision on that issue is legally effective without judicial approval.

In paragraph 3 of its Final Order (Dkt. # 614), the District Court, under authority granted to it under CECRA (Mont. Code Ann. § 75-10-711(8)), required BNSF to

> abate the imminent and substantial endangerment to the public health, welfare, and safety, and the environment resulting from the releases at KPT and at Reliance consistent with the requirements of the Montana Comprehensive Environmental Cleanup and Responsibility Act, Section 75-10-701 *et seq.*, MCA.

[7] The ROD for the KRY Site can be found on the web at: http://www.deq.mt.gov/StateSuperfund/KPT/RecordOfDecision/KryCompiledROD.pdf

In this portion of its Final Order, the District Court properly limited itself to its authority under CECRA in issuing an abatement order to BNSF. **How** that abatement (or cleanup) is accomplished "consistent with the requirements of" CECRA is a decision the legislature left to the expertise of DEQ under Mont. Code Ann. § 75-10-721—a decision DEQ exercised in this case with the issuance of its ROD for the KRY Site. This was acknowledged by the District Court in the next passage of its Final Order.

> The Court recognizes that DEQ has issued a record of decision (ROD) on June 30, 2008 with respect to the KPT and Reliance sites, but the ROD is not before this Court and nothing in this Order shall be deemed as either approval or rejection of the ROD. Indeed, the propriety of the ROD is being challenged in a separate legal proceeding.[8]

The District Court was correct in that the ROD was not before it at trial and it had no jurisdiction to approve or reject the ROD. Had the District Court stopped there, it would have remained within its jurisdiction.

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[8] That separate legal proceeding is a "Complaint and Appeal from Record of Decision" filed by BNSF in the Montana Eleventh Judicial District, Flathead County (hereinafter "ROD Appeal"). The ROD Appeal was subsequently transferred to the First Judicial District on DEQ's change of venue motion. BNSF appealed that change of venue and this Court issued its opinion on March 10, 2010, affirming the change of venue to the First Judicial District, *BNSF Ry. Co. v. State ex rel. Dept. of Environmental Quality,* 2010 MT 46, 2010 WL 799715.

That is, DEQ's case against BNSF was never about **how** the abatement was to take place, as DEQ already had the authority under Mont. Code Ann. § 75-10-721 to designate the "how." Not surprisingly, CECRA does not provide a method for courts to decide the technical aspects of how a cleanup should proceed. CECRA is very specific as to how the cleanup must be accomplished and who makes the decisions as to the cleanup standards and methodologies that must be used to achieve those standards. Under CECRA, DEQ (and only DEQ) has the authority to set cleanup standards and the methodologies to meet those standards. Mont. Code Ann. § 75-10-721. Section 721 sets out detailed instructions for DEQ to follow to reach those decisions and issue its ROD. DEQ's ROD is legally effective to set the "how" of a cleanup or abatement under CECRA without judicial approval.

2. The District Court overstepped its authority when it required judicial approval before the ROD would have effect.

The case against BNSF was to obtain a judicial order requiring BNSF to abate the subject contamination, which is exactly what the two above-quoted passages from the Final Order accomplished. Unfortunately, the District Court then overstepped its jurisdiction in the next portion of its Final Order at paragraph 3

> Therefore, the Court feels it would be unfair to BNSF to require it to comply with the ROD since it was never presented prior to this Court's order and is currently on appeal. However, it is this Court's finding and decision that this Final Unified Abatement Order will incorporate the ROD in whatever final form it takes when it is finally approved by a court of competent jurisdiction. The Court realizes this may cause some uncertainty and logistical and staging problems for BNSF, but the Court finds that this ruling is the best way to safeguard the interests of both parties. Clearly, the ROD is a highly technical document that will provide assistance to BNSF and DEQ in complying with their abatement responsibilities. However, since the ROD may change from its present form depending on what action a court may ultimately take, it would be unfair to impose the ROD on BNSF when in fact parts or all of the ROD may ultimately change. On the other hand, the ROD will provide the parties with valuable technical guidance in complying with the requirements of abatement.

In other words, the District Court's CECRA abatement order requires that DEQ's CECRA-authorized regulatory decision as to how the abatement should be accomplished (the KRY ROD) receive final judicial approval before that decision has effect. This reverses the deference and assumed validity that is due agency decisions and is error as a matter of law.

When the Final Order was issued, the ROD was a final agency decision under appeal by BNSF in another court. The ROD was DEQ's decision as to how the cleanup would be conducted and is entitled to the

same presumption of validity as any other legislatively authorized administrative agency decision. *Thornton v. Commissioner of Dept. of Labor and Industry*, 190 Mont. 442, 445, 621 P.2d 1062, 1065 (1980) (When reviewing an administrative order, there exists a rebuttable presumption in favor of the decision of the agency). Even more importantly, Courts must defer to an administrative agency's action based on a presumption that agency decisions are valid. *Wilderness Watch v. U.S. Forest Service*, 143 F.Supp.2d 1186, 1203 (D. Mont., 2000). The Final Order requiring judicial approval of DEQ's ROD before it governs BNSF's abatement turns that presumption on its head.

Moreover, BNSF's challenge to the ROD in another court has no effect on the validity of that decision **unless and until** the reviewing court finds the agency acted arbitrarily and capriciously in issuing its decision and remands it to the agency for further action. Mont. Code Ann. § 2-4-702(3) ("Unless otherwise provided by statute, filing a petition for judicial review of an administrative decision does not stay enforcement of the agency's decision."); *Stenstrom v. State, Child Support Enforcement Div.*, 280 Mont. 321, 328, 930 P.2d 650, 655 (1996) (appeal to district court from an administrative decision does not automatically stay the administrative

decision or proceedings.). Unless or until a court determines that the cleanup approach identified in the ROD is legally unenforceable, the remediation plan set by the ROD is the only authorized cleanup standard applicable to the contaminated site and the only path for BNSF to conduct its abatement consistent with the requirements of CECRA.

While the District Court raised concerns as to the fairness of imposing the ROD's requirements on BNSF's abatement, such imposition does not leave BNSF without remedies. To begin with, BNSF could have gone to the court where its ROD Appeal was being heard and requested a preliminary injunction against enforcement of the ROD. BNSF did not make such a request. What **is** unfair is that the District Court in this case in essence issued an injunction against the ROD without ever having the ROD before it (as admitted in its Final Order) and without requiring BNSF to make the necessary showing that it was entitled to a preliminary injunction.[9] Whether

[9] To prevail on a motion for preliminary injunction, plaintiff must show: (1) likelihood of success on the merits, (2) possibility of irreparable injury to plaintiff if injunction is not granted, (3) balance of hardships favoring plaintiff, and (4) advancement of public interest in certain cases. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U. S. Dept. of Agriculture*, 415 F.3d 1078, 1092 (9th Cir. (Mont.), 2005). This test is reflected in Montana's Code governing the issuance of preliminary injunctions at Mont. Code Ann. § 27-19-201.

BNSF should be relieved of the obligations imposed by the ROD should be left to the court that will decide BNSF's ROD Appeal.

The other area in which the District Court raised fairness concerns was that the ROD may change from its present form depending on what action the reviewing court might ultimately take. Presumably, the District Court was concerned that some effort BNSF might undertake to comply with the ROD would ultimately be unnecessary should the reviewing court fail to uphold some portion of the ROD.

This coin of potential unnecessary work has another side. If BNSF continues its abatement in noncompliance with the ROD, the work it does might have to be redone. Given the care and effort DEQ put into the ROD, together with the deference the ROD is due from the reviewing court,[10] this second side of that coin is the far more likely scenario. In the end, what is most important is that the District Court's Final Order left the "how" of the

[10] The ROD will be upheld unless and until BNSF can prove that DEQ acted arbitrarily and capriciously in reaching its decision. *Hoven, Vervick & Armine, P.C. v. Montana Commissioner of Labor*, 237 Mont. 525, 530-531, 774 P.2d 995, 998-999 (1989).

abatement muddled, inefficient and unworkable until the ROD Appeal is resolved, which could take many years.[11]

This case should be remanded to the District Court with instructions to amend its Final Order to require BNSF's abatement to comply with DEQ's ROD for the KRY Site, until and unless the court reviewing the ROD under BNSF's ROD Appeal requires that the ROD be changed.

B. CECRA's joint and several liability is not subject to the defense of apportionment.

To further its twin purposes, as stated in Mont. Code Ann. § 75-10-706(1)&(2), of protecting the public health and the environment and encouraging responsible private parties to clean up releases of hazardous substances, CECRA contains one of the most rigorous liability provisions in Montana law. "[N]otwithstanding any other provision of law" and subject only to specifically indentified exceptions and defenses," parties such as BNSF who were involved in the ownership of or activities associated with the subject facility are strictly, jointly and severally liable for the releases or threatened releases of hazardous or deleterious substances from that facility. Mont. Code Ann. § 75-10-715(1).

[11] BNSF filed its ROD Appeal on July 30, 2008 and this Court issued its opinion on March 10, 2010, resolving the venue issue in DEQ's favor. *BNSF v. DEQ*, *supra*.

Under common law, apportionment can be a defense to joint and several liability when the defendant can show: (1) that the harm is divisible; and (2) what portion of the harm the defendant caused. Restatement (Second) of Torts, §§ 433A, 881 (1976). However, apportionment is **not** one of the specifically identified statutory exceptions or defenses to CECRA's joint and several liability in Mont. Code Ann. § 75-10-715(1).[12] Nonetheless, the District Court allowed BNSF to assert and submit evidence supporting apportionment as a defense to CECRA's joint and several liability. This was plain error.

Specifically, in its Order on Pre-trial Motions, the District Court held, if "DEQ proves BNSF's liability for surface contamination at the Reliance Site, BNSF must come forward with evidence to show it was only responsible for a portion of the contamination at the site to avoid the

[12] There are many public policy reasons for superfund's rigid liability scheme, but perhaps most important is that contaminated sites, such as KPT and Reliance, pose a threat to public health and the environment and must be cleaned up. The cost of that cleanup must be borne by either the public treasury or those PLPs the legislature identified as having benefited from the activities that led to the contamination, the owners and operators of the facilities, and the generators, and transporters of the hazardous substances whose release led to the contamination. S*ee,* Mont. Code Ann. § 75-10-715(1)(a)–(d). The legislature made the public policy decision that PLPs, and not the general public, should pay for cleanups.

possibility of joint and several liability for all the surface contamination." Dkt. # 518, p. 7. In other words, the District Court held that if BNSF could prove it was responsible for only some of the releases from the Reliance facility, it could avoid CECRA's joint and several liability.[13]

This judicially created defense to CECRA's joint and several liability is contrary to the plain language of the statute. In fact, the District Court did not rely on or even cite CECRA in creating this new defense, but instead relied upon recent federal case law interpreting CERCLA, in particular, *U.S. v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781 (9th Cir., 2007), and *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870 (U.S., 2009). Dkt. # 518, pp. 6–7; Dkt. # 612, pp. 3–5.

While there are many similarities between the Federal superfund statute (CERCLA) and Montana's superfund statute (CECRA), there are several important differences. Perhaps the biggest difference is that CECRA explicitly and unequivocally provides for **joint and several liability**, while

[13] BNSF did not meet its evidentiary burden at trial to establish an apportionment defense and was ultimately held jointly and severally liable for all the releases from the Reliance facility. Dkt. # 588, *Conclusions of Law* ¶¶ 15–16, pp. 22–23. However, if the District Court's holding as to the availability of the defense of apportionment is not addressed by this Court, it will severely impact the DEQ's ability to address releases of hazardous and deleterious substances under CECRA.

CERCLA is silent as to the scope of liability it imposes. *Compare* Mont. Code Ann. § 75-10-715(1) "are jointly and severally liable for," with 42 U.S.C. §§ 9607(a)(4) "shall be liable for." That is, the issue of apportionment as a defense to liability arose under CERCLA because Congress left the determination of the scope of liability under CERCLA to the Federal courts as a matter of federal common law. *See*, *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. at 1881) (CERCLA "did not mandate 'joint and several' liability in every case.") (*citing U.S. v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio, 1983)).

While not explicitly set forth in the statute, early decisions interpreting CERCLA held that its liability was joint and several. *State of N.Y. v. Shore Realty Corp*., 759 F.2d 1032, 1044 (2nd Cir.(N.Y.), 1985). Later decisions held that federal common law requires that prior to a court's application of judicially created joint and several liability, defendants had an opportunity to prove the harm could be apportioned. *See*, *U.S. v. Burlington Northern & Santa Fe Ry. Co.*, *supra*. Accordingly, the federal common law developed a strict liability standard for CERCLA, but permitted potentially responsible parties to seek apportionment of that liability during the initial determination of liability. *Id.*

Unlike CERCLA, CECRA mandates joint and several liability. The Montana Legislature clearly and unequivocally filled the liability void left in the federal legislation by explicitly stating that liability under CECRA was joint and several "notwithstanding any other provision of law and subject only to the" specifically indentified exceptions and defenses—which do **not** include apportionment. Mont. Code Ann. §§ 75-10-715 (1), (5) and (7). That is, the opportunity for the courts to determine the scope of liability under CERCLA afforded by the silence of Congress does not exist under CECRA's explicit mandate of joint and several liability. Judicial creation of a new defense into CECRA is contrary to what the legislature inserted into the statute and contrary to black letter law regarding the construction of a statute. *See, Montana Trout Unlimited v. Montana Dept. of Natural Resources and Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (office of court is simply to ascertain and declare what is in terms of statute, not to omit what has been inserted, or insert what has been omitted).

Moreover, the Montana Legislature has reconsidered the scope of CECRA's liability since its initial passage and has demonstrated its continued intent that the scope of CECRA's liability remains joint and several. As this Court noted, in 1995 "the legislature directed DEQ to 'set

up a collaborative process' to analyze the elimination of joint and several liability with respect to cleanup of CECRA-covered facilities." *Sunburst*, *supra,* ¶ 53, *citing*, 1995 Mont. Laws 3419. BNSF's predecessor participated in that collaborative process and, in the end, the legislature chose to retain CECRA's joint and several liability—again demonstrating its intent as to the scope of liability under CECRA.

That collaboration did result in an important new statutory exception to CECRA's liability scheme. While the 1997 amendments to CECRA did not repeal joint and several liability, they added the Controlled Allocation of Liability Act (CALA) to CECRA. Sec. 12–21, Ch. 415, L. 1997.[14] CALA is a pseudo-administrative process that creates an exception to CECRA's joint and several liability and can potentially provide public funds to assist in cleanup of qualified state superfund sites, such as KPT and Reliance. Mont. Code Ann. §§ 75-10-742 through 751. In essence, CALA is an "opt-out" of joint and several liability for PLPs under CECRA, where qualified PLPs

[14] The legislation creating CALA also codified a PLP's right to bring a contribution action against other PLPs and have the liability among those persons allocated using the CALA factors. Sec. 10, Ch. 415, L. 1997; Mont. Code Ann. § 75-10-724. However, these private rights of action are between PLPs and do not affect DEQ's application of joint and several liability to them.

willing to commit to the required cleanup may have their liability apportioned by a neutral allocator based on factors set out in CALA. *Id*. In fact, BNSF at one time submitted a CALA petition to DEQ for the KPT facility, but later withdrew it. Dkt. # 524, Exhibits A and B. CERCLA has no equivalent of CALA.

While CALA provides a form of apportionment for CECRA liability, before a PLP is entitled to that apportionment, it must comply with CALA's requirements. Mont. Code Ann. §§ 75-10-744 through 750. This did not occur at the subject facilities. The District Court's creation of an apportionment defense to CECRA's liability renders CALA superfluous, as no PLP would go through the CALA process if apportionment was already available as a defense to CECRA's joint and several liability. Clearly then, the intent of the legislature is that outside of CALA there is no opportunity for apportionment before the application of joint and several liability under CECRA. The District Court's creation of the apportionment defense to CECRA's joint and several liability must be reversed.

C. The District Court's dismissal of DEQ's public nuisance claim was error.

Despite finding that the releases of hazardous and deleterious substances from the KPT and Reliance facilities resulted in imminent and

substantial endangerment to public health, safety, and welfare and the environment, the District Court did not find the existence of a public nuisance and dismissed DEQ's related claims. Specifically, with respect to the Reliance facility, the District Court held

> the Court notes that the Reliance facility contains no residences and is not used by any party for any purpose. The Court also acknowledges, however, that several drinking wells within the immediate area are threatened by the groundwater plume mentioned above. In order to be a public nuisance, the situation must affect an entire community, neighborhood, or a considerable number of persons. While there is some threat to neighboring wells and at least one well has been shut down due to a PCP detection, the Court has received no complaints from any neighbors or from community leaders in Kalispell. Further, liability for a nuisance is not joint and several, so this Court feels it would be inappropriate to conclude that BNSF's activities, mentioned above, are a nuisance. Since this is not a joint and several liability claim, the Court feels it inappropriate to find that the whole nuisance is the responsibility of BNSF since much of the problem has been caused by others.

Dkt. # 588, *Conclusion of Law*, ¶ 18.

The District Court's conclusion that the contamination of the sites is not a public nuisance is wrong as a matter of law and should be reversed. None of the Court's rationales—that the contamination does not constitute a "public nuisance," that the claim inappropriately seeks to establish joint and

several liability, and that damages are limited to those authorized by CECRA—are supported by the law. Dkt. # 518, pp. 9–10.

1. Contamination of the sites is not only a public nuisance, it is a public nuisance *per se*.

Mont. Code Ann. § 27-30-102 defines a public nuisance as a nuisance which affects a community, neighborhood, or considerable number of people, even if that affect is unequal. The District Court concluded that since there were no residences on the contaminated sites, and since the Court had received no complaints from any neighbors or community leaders, the contamination was not a public nuisance. Dkt. # 588, *Conclusions of Law*, ¶ 18. This conclusion not only contradicts the Court's own findings of fact that the contamination imminently threatens public health and safety, but also applies an overly narrow interpretation of "public nuisance."

The District Court found as a matter of fact that the contamination posed an imminent and substantial endangerment to public health and the environment at both the KPT facility ("contamination has caused harm to the environment [...] and if the public comes into contact with that contamination, harm will result") and the Reliance facility ("the PCP, dioxins, furans, lead, and petroleum hydrocarbons located at the Reliance facility are hazardous and deleterious substances that constitute an imminent

and substantial endangerment to the environment and to the public health, welfare, and safety"). Dkt. # 416, pp. 14–15; Dkt. # 588, *Conclusions of Law*, ¶ 13.

The District Court found that DEQ's screening levels establish thresholds at which a contaminant of concern may pose "an imminent and substantial endangerment to the public health, safety, or welfare" and that DEQ's site-specific cleanup levels establish levels at which a contaminant poses an imminent and substantial endangerment to the public health, safety, or welfare. Dkt. # 588, *Findings of Fact,* ¶ 44. DEQ established that the contamination exceeded the cleanup levels in the surface and subsurface soils at both the KPT and Reliance facilities (including dioxin, lead, PCP, and petroleum), and in the groundwater under and extending beyond their historical property boundaries (including dioxins, hydrocarbons, and PCP). *Id*., *Findings of Fact,* ¶¶ 45–47, 60. In discussing the possible migration of contaminants from one area to another, the Court found that all of the PCP in the Reliance site soils and groundwater is from the KPT facility operations and most likely migrated through a groundwater plume and wind to the Reliance facility "and elsewhere." *Id*., *Findings of Fact,* ¶¶ 59–65, 70.

In the same paragraph that rejects the public nuisance claim, the Court "acknowledges, however, that several drinking wells within the immediate area are threatened by the groundwater plume mentioned above." *Id.*, *Conclusions of Law,* ¶ 18. Therefore, the District Court established that the contamination of the subject facilities poses actual and imminent public health risks based on incontrovertible record evidence. Its conclusion that no public nuisance has been shown is, therefore, insupportable.

Even assuming the District Court had not held that a public health risk exists from the contamination of the facilities, the record evidence clearly establishes a public nuisance affecting "a considerable number of persons." Based on this Court's prior decisions regarding the nature of Montanans' constitutional right to a clean and healthful environment, environmental contamination which poses a imminent and substantial threat to public health, safety, or welfare or the environment (such as that at the KPT and Reliance facilities), should be considered a public nuisance *per se*.

Montana has defined "nuisance" as "[a]nything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or

property..." Mont. Code Ann. § 27-30-101(1). This Court has applied the following definition of nuisance *per se*

> ...an act, occupation, or structure, which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Other definitions are: any act or omission or use of property or thing which is of itself hurtful to the health, tranquility, or morals, or which outrages the decency of the community; that which cannot be so conducted or maintained as to be lawfully carried on or permitted to exist; and, as related to private persons an act or use of property of a continuing nature, offensive to and legally injurious to health and property, or both.

McCollum v. Kolokotrones, 131 Mont. 438, 443–444, 311 P.2d 780, 782–783 (1957) (*citing* 39 Am.Jur., Nuisances, Sec. 11, p. 289).

Whether a condition or activity constitutes a nuisance *per se* is a public policy determination. *Van Voast v. Blaine County*, 118 Mont. 375, 167 P.2d 563 (1946); *Andrieux v. City of Butte*, 44 Mont. 557, 121 P. 291, 292 (1912); *Harless v. Workman*, 114 S.E.2d 548 (W.Va., 1960) (*citing* 66 C.J.S. Nuisances § 8, pp. 741-742). Montana's highest public policy, its Constitution, declares a fundamental right in all persons to a clean and healthful environment (Mont. Code Ann. § 85-2-101; Mont. Const. Art. IX, § 3(3)) and imposes on everyone an obligation to maintain and improve the environment (*Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236). As a

fundamental Constitutional right, the right to a clean and healthful environment is more than a mere legislative permit—it is a statement of principle, of public value.

Furthermore, the guarantee recognizes the fundamental importance of the natural environment in maintaining human health and welfare. According to the record of the Constitutional Convention, that body clearly intended the modifier "healthful" to refer to *human* health, and delegates were intensely concerned that their amendment to the original proposal (adding the words "clean and healthful") be interpreted "to permit no degradation from the present environment and affirmatively require enhancement of what we have now." *Id*., ¶ 69, and generally, ¶¶ 66–77. In this way, the right to a clean environment cannot be separated from the protection and promotion of human health, because human health was one of, if not ***the***, primary intent of establishing the right. Degradation and contamination of soil and water by dioxins, PCPs, petroleum, lead, and other toxic substances are not only injurious to human health, but are an affront to all Montanans' right to a clean and healthful environment. It surely meets this Court's definition of nuisance *per se* insofar as it is necessarily "hurtful to the health, tranquility, or morals, or [...] outrages the decency of the

community" and "offensive to and legally injurious to health and property." Environmental contamination severe enough to be found by the District Court to be an imminent and substantial endangerment must be a *per se* public nuisance in Montana.

The public has a right to a clean and healthful environment regardless of who owns the polluted property. The right to a clean and healthful environment is not bounded by an individual's ownership of property or even their proximity to a degraded or polluted area. *MEIC v. DEQ*, *supra*, ¶ 79 (the right to a clean and healthful environment was implicated not by proof of direct harm to plaintiffs or plaintiffs' property, but by plaintiff's demonstration that defendants' actions had degraded the environment and a state agency had identified a "significant impact" requiring agency action). Since pollution, wherever located, is injurious and offensive to that right, pollution that poses an imminent and substantial threat to public health is a public nuisance *per se*.

Most states that have looked at the issue have held that pollution is a nuisance *per se*. *State v. Fermenta ASC Corp.*, 608 N.Y.S.2d 980, 985 (N.Y.Sup., 1994) (release of hazardous waste is nuisance *per se*); *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah, 1982) (pollution of water

is nuisance *per se*); *California Dept. of Toxic Substances Control v. Payless Cleaners*, 368 F.Supp.2d 1069, 1081 (E.D.Cal., 2005) (Pollution of water constitutes a public nuisance and becomes a public nuisance *per se* when the pollution occurred as a result of discharge of waste in violation of Cal.Wat.Code 13000, *et seq.*); *see also*, *Newhall Land & Farming Co. v. Superior Court*, 23 Cal.Rptr.2d 377 (Cal.App. 5 Dist., 1993); *Tiegs v. Watts*, 135 Wash.2d 1, 954 P.2d 877, 879 (Wash., 1998) (The Washington State Supreme Court has explicitly stated that "[d]ischarges in violation of permit requirements constitute a nuisance which subjects violators to damages."); *Friends of the Sakonnet v. Dutra*, 749 F.Supp. 381, 395 (D.R.I., 1990) (This Court has previously determined that the illegal release of pollutants into the Sakonnet River is a nuisance *per se*); *Wood v. Picillo*, 443 A.2d 1244 (R.I., 1982) (Rhode Island courts have demonstrated they will now consider the pollution of subterranean waters nuisance *per se.*); *Machipongo Land and Coal Co., Inc. v. Com.*, 799 A.2d 751, 774 (Pa., 2002) ("However, although mining is not a nuisance *per se*, pollution of public waterways is."); *Village of Dwight v. Hayes*, 37 N.E. 218 (Ill., 1894) (discharge of sewage into a small stream is material pollution and nuisance *per se*); *Espinosa v. Roswell*

Tower, Inc., 910 P.2d 940, 944 (N.M.App., 1995) (violations of the asbestos NESHAP created a public nuisance *per se*.).

Even if pollution limited to a particular location were not a public nuisance *per se*, the contamination in this case would still be considered a public nuisance because it is not limited to the historical property boundaries of KPT and Reliance. The District Court found that the groundwater underlying both subject sites is contaminated in a way posing an "imminent threat" to public health and welfare, and the pollution spread from the KPT facility to the Reliance facility via a groundwater plume. The corpus of that water is held in trust by the State for the people. Mont. Code Ann. § 85-2-101; Mont. Const. Art. IX, § 3(3). As such, the contamination at issue here is not confined to BNSF's property, but affects property held in trust for all Montanans. DEQ's public nuisance claim explicitly alleges injury to "state waters and the public." *Amended Complaint*, Dkt. # 6, ¶ 29. Pollution of the groundwater sufficient to result in an "imminent threat" to public health is a public nuisance *per se* because it degrades the property of all Montanans.

2. Liability for a public nuisance claim can be joint and several.

It is undisputed that BNSF is responsible for at least some part of the environmental contamination. The District Court found as a matter of fact

that BNSF transported crude oil (at least 300,000 gallons), refined petroleum products (at least 790,000 gallons), and PCP (at least 2,298,000 pounds) to and from the Reliance and KPT facilities, and that toxic sludge in the soil and groundwater was at least partly contaminated by BNSF's activities. Dkt. # 588, ¶¶ 27, 34, 37, 50. Yet, the District Court's conclusion of law states

> liability for a nuisance is not joint and several, so this Court feels it would be inappropriate to conclude that BNSF's activities, mentioned above, are a nuisance. Since this is not a joint and several liability claim, the Court feels it inappropriate to find that the whole nuisance is the responsibility of BNSF since much of the problem has been caused by others.

Dkt. # 588, *Conclusions of Law*, ¶ 18.

Here, the District Court erred in its conclusion of law that liability for a public nuisance cannot be joint and several. Liability for a public nuisance can indeed be joint and several. *See, e.g.*, *Talmage v. City of Kalispell*, 2009 MT 434, 354 Mont. 125, 223 P.3d 328 (claim for multiple causes, including private nuisance, against two defendants). Moreover, nothing in Montana law prohibits or limits the imposition of joint and several liability for nuisance. The remedies for public nuisance actions include abatement and civil actions, Mont. Code Ann. § 27-30-202, and where civil actions are brought against multiple defendants, liability may be joint and several.

Mont. Code Ann. § 27-1-703. A public nuisance action against multiple defendants alleging joint and several liability is, therefore, well within the bounds of Montana's civil liability statutes.

In this case, DEQ's claim of public nuisance against all defendants, jointly and severally, is the only appropriate approach to liability because the environmental degradation at issue is not an isolated harm (there are multiple injuries caused by different pollutants to different areas and substances) and does not result from a single act or occurrence. Since these multiple causes and effects cannot be easily parsed out and individual liability assigned for each, a claim of joint and several liability against each and all responsible parties is the appropriate action. *See, Truman v. Montana Eleventh Judicial Dist. Court*, 2003 MT 91, 315 Mont. 165, 171–172, 68 P.3d 654, 659–660 (In the absence of proof that an injury is divisible, the defendant is jointly and severally liable for the plaintiff's entire injury pursuant to the indivisible injury rule.) Restatement (Second) of Torts, §§ 433A, 881 (1976).

The District Court's apparent concern that BNSF might be held responsible for more than its fair share of liability for the public nuisance in this case is misplaced. As this Court has stated, "where the tortious act is

established, it is better that the tortfeasor should be subject to paying more than his theoretical share of the damages in a situation where... it [is] difficult to prove which tortious act did the harm." *Truman, supra*, at 172, *quoting Azure v. City of Billings*, 182 Mont. 234, 253, 596 P.2d 460, 471 (1979). Where a plaintiff has stated a prima facie case that the defendant contributed to the cause of the injury, the burden shifts to the defendant, not the court, to prove that the injury was divisible and to apportion liability accordingly. *Azure*, *supra, at* 252–53, 470–71.

3. Damages for a public nuisance are not limited to those authorized by CECRA.

The District Court's limitation of DEQ's ability to seek compensation for its abatement actions through the public nuisance claim is improper. The court stated that DEQ could bring the public nuisance claim as an alternative theory, but not in addition to its CECRA claim, and that DEQ was not entitled to any damages beyond those allowed by CECRA. Dkt. # 588, *Conclusions of Law,* ¶ 19. This decision flies in the face of controlling precedent and unjustly limits DEQ's ability to fully remediate the contamination and fulfill its statutory and constitutional duties.

Specifically, there are two types of damages for public nuisance denied DEQ as a result of the District Court's holding. First, is DEQ's

direct costs related to the cleanup of the contamination. As a public entity responding to a public nuisance, DEQ is entitled to the recovery of its reasonable costs incurred in that response from the party or parties who created or maintained the public nuisance. Mont. Code Ann. §§ 27-30-202(1)(b), 204. It is true, as intimated by the District Court, that under CECRA (Mont. Code Ann. § 75-10-722), DEQ is entitled to recover most of those costs as "remedial action costs" from liable persons such as BNSF. While CECRA's definition of "remedial action costs" is broad (Mont. Code Ann. § 75-10-701(23)) and most of DEQ's costs in responding to BNSF's public nuisance will be eligible for recovery under CECRA, there may be some that are not. As this Court has held, CECRA does not preempt common law causes of action. *Sunburst*, *supra,* ¶¶ 50–59. Therefore, DEQ should have the right to seek its costs in responding to BNSF's contamination under both CECRA and public nuisance.

The second type of damages denied DEQ as a result of the District Court's limiting its damages to those allowed under CECRA are restoration damages. *Id*. The District Court avoided implementing the holding of *Sunburst* by assuming that the case would only control where *private* parties, such as the *Sunburst* plaintiffs, were bringing the common law claim. Dkt. #

588, p. 8. However, the rationale and underlying constitutional rights cited in the *Sunburst* decision imply no such limitation. Rather, the Court's rationale is based on the principle of obtaining full environmental restoration and a complete remedy of damages to people and property—the identity of the party seeking restoration is immaterial. The Court stated that "restoration damages must be available to compensate a plaintiff fully for damages to real property when diminution in value fails to provide an adequate remedy." *Sunburst, supra,* ¶ 38. This Court also invoked plaintiffs' constitutional right in providing for complete environmental restoration, reasoning that "[a] strict cap on restoration damages would also fail to provide an adequate remedy for an injury to the environment… We now have adopted Restatement (Second) of Torts § 929 to allow for the recovery of restoration damages... **An award of restoration damages serves to ensure a clean and healthful environment**.") *Id*., ¶ 64 (emphasis added). The holding of *Sunburst* should, therefore, not be limited to private actions, but should apply equally to actions brought by the state in the name of all Montanans.

DEQ's intent in seeking to recover under the public nuisance theory in addition to its CECRA action is to ensure complete recovery of all remedial

action costs it incurs at the KRY Site. If DEQ is unable to recover some part of the estimated $32.5 million clean-up costs, the environment will not be restored to a "clean and healthful" condition because DEQ does not have funding available to meet any shortfall. DEQ is statutorily mandated to ensure the cleanup of the subject sites, and is constitutionally bound to protect and restore a clean and healthful environment.

D. <u>The admission of the testimony of Pat Keim was error</u>.

To support its defenses to CECRA liability, BNSF offered the testimony of Pat Keim as to whether or not releases of petroleum occurred from railcars at the Reliance facility. At trial, Mr. Keim's testimony was offered as "expert in historical railroad practices regarding the movement of cars." TR., p. 1231, ll. 15–18. DEQ objected to Mr. Keim's testimony on the basis such testimony was not expert testimony admissible under MRE 702, but that of routine practice governed under MRE 406, and that the testimony of Mr. Keim did not satisfy the requirements of that rule. The District Court overruled the objection.

1. <u>Mr. Keim's testimony was not expert testimony under MRE 702</u>.

Had Mr. Keim's testimony been proper under MRE 702, he could offer his opinion without having to personally observe the events. *See*, MRE

703. MRE 702 allows the court to admit expert opinion testimony if "technical or specialized knowledge will assist . . . to determine a fact in issue" and the witness is qualified as an expert by "knowledge [or] experience." Mr. Keim was disclosed as an expert based upon his experience and disclosed to offer opinion about practices, but the substance of his testimony simply concerned the "routine practices" of railroads in general regarding movement/loading/unloading of rail cars and, thus, MRE 406—not MRE 702—should control the admission of his testimony.

2. Mr. Keim's testimony did not satisfy the requirements of MRE 406.

Testimony as to routine practice under MRE 406 is subject to the constraints of MRE 701 regarding proof. That is, if testimony is offered under MRE 406, the method of proof is governed by MRE 701, which must be based on personal observations. *Mydlarz v. Palmer/Duncan Const. Co.*, 209 Mont. 325, 343, 682 P.2d 695, 704 (1984) (under MRE 701 opinion must be based upon actual perceptions of the witness and helpful to the trier of fact to understand the facts in issue).

The railroad company whose conduct at the Reliance facility was at issue at trial was a predecessor of BNSF, the Great Northern Railroad Company ("GN"). The trial record demonstrates that Mr. Keim's personal

observation forming the basis of his MRE 406 routine practice testimony were of the practices of the railroad industry generally based on rail companies other than GN. Mr. Keim had very little, if any, personal observation of GN practices and no observation of activities at the Reliance facility. TR., pp. 1233–1234, ll. 1–25, ll. 1–20. He had never served on a GN train crew and had only observed GN's conduct at issue (the delivery and pulling of rail cars from customer's facilities) "three or four times" during a three month assignment in 1969 in Minneapolis. TR., p. 1234, ll. 10–13. Yet, the District Court allowed Mr. Keim to give testimony as to how GN handled, loaded and unloaded railcars at the Reliance facility. TR., p. 1236, ll. 12–14, *et seq*.

While MRE 406 allows testimony as to the routine practices of organizations, it must be the routine practices of the organization at issue to which the witness testifies, not the routine practice of other organizations. For example, while testimony as to the habits of individuals is also allowed under MRE 406, it would not be proper habit testimony as to a defendant if the foundation of the habit was the conduct of other people. Likewise, the routine of other railroad companies at other customer facilities cannot be used to establish the routine of GN at the Reliance facility. Such testimony

can be used to establish the standard of care in an industry. *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir., 1975). But it cannot be used to show that an individual or organization followed that routine. *R.B. Ventures, Ltd. v. Shane*, 2000 WL 520615, *3–4, 54 Fed.R.Civ.Serv. 751 (S.D.N.Y., 2000) (unreported).

Furthermore, testimony under MRE 406 is limited to evidence of habits and custom, and opinion as to consequences of such habits or customs is barred. *See*, *Garrison v. Trowbridge*, 119 Mont. 505, 510, 177 P.2d 464, 467 (1947) (where habits and customs are admissible the fact of such habits and customs and not conclusions as to consequences thereof is all court may allow in evidence). Here, while Mr. Keim testified as to practices of railroads, he also was improperly allowed to opine as to the consequences of such practices. TR., p. 1247, ll. 5–16, p. 1248, ll. 1–16, p. 1250, ll. 20–25. The District Court's admission of Mr. Keim's opinions is error.

VII. CONCLUSION

For the above described reasons, DEQ requests the following relief:

1. This case be remanded to the District Court with instructions to amend its Final Order to require BNSF's abatement to comply with DEQ's

ROD for the KRY Site until and unless the court reviewing the ROD requires that the ROD be changed;

2. The District Court's creation of the apportionment defense to CECRA's joint and several liability be reversed;

3. This case be remanded to the District Court with instructions to grant DEQ judgment as to its public nuisance claim and set a hearing to allow DEQ to present evidence on its claim for nuisance damages.

4. On remand, the District Court be instructed to exclude the testimony of Mr. Keim as to the routine practices of GN at the Reliance facility.

DATED this 15th day of March, 2010.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *APPELLANT'S BRIEF* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2003 is 9,990, excluding Certificate of Compliance and Certificate of Service.

DATED this 15th day of March, 2010.

_____

R. Allan Payne
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2010, a true and correct copy of the foregoing *APPELLANT'S BRIEF* was duly served, via First Class U.S. Mail, postage prepaid, on the attorneys of record addressed as follows:

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